

It was undisputed Elizabeth Ann Wuthnow suffered bilateral knee injuries after a work-related slip and fall. The disputed issues included whether a medical bill was for authorized medical treatment; the nature and extent of disability; and, whether, in the calculation of compensation due, the weeks of temporary total disability compensation paid should be deducted from the weeks of compensation payable for the scheduled injuries.

The Administrative Law Judge (ALJ) found Wuthnow sustained a 7 percent permanent partial impairment to each leg.¹ The ALJ further found the medical bill was for authorized medical treatment and ordered respondent to pay the bill. Finally, the ALJ determined respondent was entitled to a credit for the weeks of temporary total disability compensation paid.

Wuthnow requests review of the nature and extent of her disability and whether the ALJ erred by deducting the weeks of temporary total disability compensation paid from the number of weeks of permanent partial disability compensation payable for her scheduled injuries. Wuthnow argues the ALJ erred in disregarding the rating opinion of her medical expert and, at a minimum, the ratings from the two medical experts should be averaged. Wuthnow further argues that, despite administrative regulation and appellate court precedent, there is no specific statutory authority to deduct the weeks of temporary total disability compensation paid from the number of weeks payable for a scheduled injury.

Respondent argues that the ALJ's Award should be affirmed.

The issues for Board determination are the nature and extent of disability and whether, in the calculation of compensation, the weeks of temporary total disability compensation paid should be deducted from the maximum weeks of compensation payable for the scheduled disabilities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those fact findings herein. The Board adopts the ALJ's findings of fact as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, on October 29, 2007, Elizabeth Wuthnow² slipped on a wet floor and fell suffering dislocations to both knees. Ultimately, she had surgery twice on the left knee and once on the right knee. Dr. Erik Severud, the treating orthopedic surgeon, rated Wuthnow with a 7 percent functional impairment to each lower extremity based upon table

¹ Although Wuthnow suffered bilateral knee injuries she had returned to substantial gainful employment and there was neither an allegation nor evidence she suffered a permanent total disability. Stated another way, the presumption of permanent total disability for bilateral scheduled injuries was rebutted by the fact she had returned to substantial gainful employment.

² Now Elizabeth Aragon due to her divorce.

64 of the AMA *Guides*³. Wuthnow's medical expert, Dr. Pedro Murati, rated Wuthnow with a 15 percent functional impairment to the right lower extremity and 10 percent functional impairment to the left lower extremity.

Dr. Murati rated Wuthnow with a 5 percent right lower extremity impairment due to patellofemoral syndrome and an additional 8 percent to the right lower extremity due to atrophy. These ratings combine for a 13 percent impairment to the right lower extremity. Dr. Murati rated Wuthnow with a 5 percent left lower extremity impairment due to patellofemoral syndrome. For what he termed extensive surgical procedures, Dr. Murati then rounded Wuthnow's right lower extremity impairment up to 15 percent and the left lower extremity impairment up to 10 percent.

The ALJ analyzed the evidence in the following fashion:

The court has before it two opinions as to the nature and extent of impairment suffered by Claimant as a result of her work injury. Dr. Severud, the authorized treating physician, treated Claimant over several months, personally reviewed her radiological studies, and performed all of her surgeries. Through arthroscopy, Dr. Severud was actually able to visualize the interior of Claimant's knees. In contrast, Dr. Murati saw Claimant only on two occasions, provided no treatment, and did not have the benefit of reviewing Claimant's radiological studies. Dr. Murati rated Claimant for atrophy that he attributed to the effects of the work injury, while Dr. Severud noted that Claimant already exhibited atrophy or underdeveloped quadriceps at the outset of his treatment. Dr. Severud first examined Claimant on the date of her accident, while Dr. Murati did not see her for months afterwards. Dr. Murati, without citing to any authority in the **Guides**, "rounded up" his ratings for "extensive surgical procedures." In doing so, however, Dr. Murati irrationally "rounded up" the knee with fewer surgical procedures more than he did the knee with more surgical procedures.

The court will give greater credence to the findings, opinions and conclusions of Dr. Severud, the authorized treating physician. **Claimant has suffered a 7% impairment of function to each lower extremity.**

The Board agrees and affirms. It is significant that the atrophy in Wuthnow's right lower extremity was already present when the accident occurred and consequently not caused by the work-related accident. And Dr. Murati initially rated Wuthnow at 5 percent for each lower extremity before adding a rating for the preexisting atrophy and then rounding up his ratings for each lower extremity.

Wuthnow's injuries are listed in the schedule of K.S.A. 44-510d; consequently, that statute controls the calculation of her permanent partial disability benefits. When deter-

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

mining the number of weeks of permanent disability benefits Wuthnow was entitled to receive for each lower extremity, the ALJ deducted the number of weeks of temporary total disability benefits that claimant was paid from the 200 maximum weeks of benefits on the schedule for an injury to a leg. A total of 23 weeks of temporary total disability compensation was paid on this claim and the ALJ split those weeks and deducted 11.50 weeks in the benefit calculation for each separate lower extremity.

As previously noted, K.S.A. 44-510d(a)(16) provides that a worker is entitled to no more than 200 weeks of permanent disability benefits for the loss of a leg. But that statute does not specifically address how temporary total disability benefits figure into the computation. Indeed, the Workers Compensation Act is silent regarding that detail. Consequently, K.A.R. 51-7-8 was adopted and it provides:

(a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.

(2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.

(b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.

(1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:

(A) deduct the number of weeks of temporary total compensation from the schedule;

(B) multiply the difference by the percent of loss or use to the member; and

(C) multiply the result by the applicable weekly temporary total compensation rate.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

(c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be

at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

(5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

In short, the regulation requires that Wuthnow's weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent partial disability benefits due Wuthnow.

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.⁴

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.⁵

"Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with

⁴ K.S.A. 44-573.

⁵ See K.S.A. 77-425; *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988); *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979).

the law.” *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, Syl. ¶ 1, 673 P.2d 1126 (1983).⁶

Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.⁷ Consequently, claimant’s award of permanent partial disability benefits must be computed after reducing the maximum 200 weeks by the temporary total disability weeks.⁸ The ALJ’s calculation of Wuthnow’s benefits for each separate scheduled injury is affirmed for the foregoing reasons.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated April 1, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Christopher J. Shepard, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge

⁶ *State v. Pierce*, 246 Kan. 183, 189, 787 P.2d 1189 (1990).

⁷ *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 2, 763 P.2d 317 (1988).

⁸ See also *Rhea v. Kansas City Power & Light Co.*, 176 Kan. 674, 678, 272 P.2d 741 (1954); *Cowan v. Josten’s American Yearbook Co.*, 8 Kan. App. 2d 423, 427, 660 P.2d 78, rev. denied 233 Kan. 1091 (1983).